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MUNICIPAL LIABILITY FOR REQUIRING UNFIT POLICE OFFICERS TO CARRY GUNS

I. Introduction

The stress of police work¹ is evidenced by high rates of suicide, marital problems, alcoholism, heart disease, and psychosomatic illnesses.² Combined with the requirement that police officers carry guns while off-duty,³ the emotional stress of police work creates the risk that a police officer will use his gun wrongfully to injure himself or another party.⁴ This risk, however, is believed to be outweighed by the advantages of having a police officer on twenty-four hour duty.⁵

1. Police work is considered one of the most stressful occupations. See Farmer & Monahan, *The Prevention Model for Stress Reduction: A Concept Paper*, 8 J. POLICE SCI. & ADMIN. 54 (1980); Kroes, Margolis, & Hurrell, *Job Stress in Policemen*, 2 J. POLICE SCI. & ADMIN. (1974).

2. Farmer & Monahan, *supra* note 1, at 55; Kroes, Margolis & Hurrell, *supra* note 1, at 145. This stress is attributed to both the nature of the police work and the nature of the police organization. Farmer & Monahan, *supra* note 1, at 54. Police officers deal with the worst that society has to offer on a routine basis. The work is a combination of long stretches of boredom which may be punctuated by moments of terror. The work also is completely unpredictable. Record at A441, *Bonsignore v. City of New York*, 683 F.2d. 635 (2d Cir. 1982).

One study has indicated the following sources of stress for the police officer: department administration, the courts, community relations, equipment, line of duty crisis situations, changing shift routines and isolation, boredom, and inactivity. Farmer & Monahan, *supra* note 1, at 55. See also Reiser, *Some Organizational Stresses on Policemen*, 2 J. POLICE SCI. & ADMIN. 156 (1974). The police department is said to represent a family with a strict hierarchical organization. This organization creates a pecking order which operates on principles of seniority and rank, and affects communication, morale and discipline. Authoritarian management approaches predominate in the traditional police organization, with relatively little attention given to individual problems or human factors. Other stress factors within the police organization include the internal discipline structure and peer group influence. *Id.*

3. See note 210 *infra* for New York City's regulation. Few police departments have restricted the bearing of weapons by officers when not on active duty while most departments encourage the practice. Safer, *Deadly Weapons in the Hands of Police Officers, On Duty and Off Duty*, 49 J. URB. L. 565, 574 (1971). See note 50 *infra*.

4. "The off duty officer, armed in a manner that would be unlawful if he were a civilian, may be emboldened to respond in a violent manner to frustrations which at times beset most humans." Safer, *supra* note 3, at 576. Because a police officer is trained to shoot a weapon, it is more likely that he will use that weapon as a means to injure someone. In a recent case, an expert witness testified that there is a direct correlation between possession of handguns and the occurrence of deadly violence in

The liability of municipalities for injuries resulting from unfit officers' use of firearms is increasing. The Second Circuit, in *Bonsignore v. City of New York*,⁶ recently adopted an expanded theory of liability, imposing a duty upon municipalities⁷ to adopt reasonable procedures to identify police officers who are unfit to carry a firearm at all times.⁸ A city may now be liable for damages⁹ for the harmful acts of a police officer caused by the city's failure to adopt reasonable screening and monitoring programs for its armed officers.¹⁰ Requiring a

police families. Moreover, a person with a severe depressive disorder is more likely to commit an act of homicide against his or her spouse if that person possesses firearms. Record at A611-12, *Bonsignore*. "[The gun is] itself an impersonalized expression of aggression. It's an instrument that could deliver danger very rapidly. It does not require a hell of a lot of forethought. One could act off the impulse and discharge it rather quickly using the instrument. There is no basis for the perpetrator to come into physical contact with his potential victim." Record at A626, *Bonsignore*. Almost 100% of the suicides among police officers in New York City are committed with a gun, whereas in the general population of men only 63% commit suicide with guns. Record at A453, *Bonsignore*.

5. Safer, *supra* note 3, at 574-79. It has been suggested that the use of firearms by policemen be restricted, as is true in England, to only those who absolutely need to use weapons in the course of their duties. This point of view has not gained wide acceptance in this country. *Id.* at 574. However, presidential commissions have recommended "the development of non-lethal but speedy and efficient weapons" to replace the handguns carried by police officers. *Id.* at 576.

6. 683 F.2d 635 (2d Cir. 1982). See notes 130-76 *infra* and accompanying text for a discussion of the case.

7. The New York City Police Department puts great weight on Judge Sofaer's statement at 521 F. Supp. 394, 402 n.3, that it would be improper to permit the *Bonsignore* decision to serve as a basis for collateral estoppel against the city in future lawsuits. Interview with Assistant Commissioner Rosemary Carroll, New York City Police Department, in New York City (March 2, 1983) [hereinafter cited as Carroll Interview]. The *Bonsignore* court noted that the city "inexplicably offered virtually no defense of its programs" and that the city should be free to relitigate against other plaintiffs the adequacy of its psychological detection and treatment programs. 521 F. Supp. at 402 & n.3. The city therefore believes that it was not really negligent in adopting the programs and is confident that, had it been given the chance to defend the programs, the city would have been successful. Carroll Interview, *supra*; Interview with Sgts. Gerard W. Kelly and David W. Nadel, New York City Police Department, in New York City (March 4, 1983). Since 1976, the city has expanded and improved its program. See notes 192-210 *infra* and accompanying text. It is yet to be seen whether the city can successfully defend the programs that were in effect in 1976 and those in existence today. Nevertheless, other municipalities are potentially liable on the same issue.

9. The number of liability suits against police departments has increased greatly in the last 15 years. Between 1967 and 1971, liability suits increased by 446%. As a result, liability insurance for police has become more difficult to procure. Large cities, including New York, have always been uninsurable. Krajick, *The Liability Crisis: Who Will Insure the Police?*, POLICE MAG. 8, 8-9 (March 1978).

10. *Bonsignore*, 683 F.2d at 638.

police officer to be armed without adequate prior screening by the city, said the court, poses a risk of harm to the officer, other policemen and members of the public.¹¹

Traditionally, municipalities were liable to victims of police shootings under the theories of respondeat superior,¹² negligent hiring or retention,¹³ negligent training,¹⁴ or under 42 U.S.C. §1983.¹⁵ Municipal liability was precluded, however, if the victim was shot by a police officer: (1) acting outside the scope of his duty; (2) acting in abuse of the privilege of carrying a gun; or (3) while the officer was committing a crime.¹⁶ In *Bonsignore*, however, the jury found that the police officer's intentional assault was not such an intervening act and the Second Circuit affirmed.¹⁷ The court held that the city, by requiring its officers to carry guns at all times, could have reasonably anticipated that the failure to identify those officers who may be unfit for that responsibility would result in injury from an unfit officer's use of a gun.¹⁸ *Bonsignore*'s expansion of liability indicates the need for municipalities to develop screening and monitoring procedures which will survive judicial scrutiny.

This Note will examine liability for injuries resulting from a municipality's failure to monitor the fitness of police officers who are required to carry guns. The Note will review the development of municipal liability for police shootings and will examine various theories under which victims have recovered damages from municipalities. Next, *Bonsignore v. City of New York* will be analyzed in terms of its expansion of the negligence theory of municipal liability and its warning to municipalities to establish reasonable screening and monitoring programs to detect unfit policemen. Finally, procedures will be recommended for detecting unfit police officers so that they may be identified and evaluated before harmful or fatal incidents occur.

II. An Overview of Municipal Liability

The principle of sovereign immunity is rooted deeply in the common law.¹⁹ Municipal corporations, created by a sovereign, tradition-

11. *Id.*

12. See notes 42-63 *infra* and accompanying text.

13. See notes 67-79 *infra* and accompanying text.

14. See notes 80-95 *infra* and accompanying text.

15. See notes 96-129 *infra* and accompanying text.

16. See notes 52-61, 93-94 & 116-20 *infra* and accompanying text.

17. *Bonsignore*, 683 F.2d at 638. See notes 160-63 *infra* and accompanying text.

18. *Bonsignore*, 683 F.2d at 638.

19. The principle appears to have developed from the concept "the king can do no wrong." See Fox, *The King Must Do No Wrong: A Critique of the Current Status*

ally enjoyed the same immunity from tort liability as the sovereign itself. Immunity is predicated on the theory that the sovereign may not be sued without its consent, and that an agency of the sovereign is likewise immune.²⁰ Subsequently, a majority of the states recognized a distinction between governmental and proprietary functions in connection with the immunity of municipal corporations. This distinction stems from the dual role of a municipality. A municipality, as a subdivision of the state, is charged with the performance of certain activities which are usually the responsibility of a sovereign. A municipality also has a corporate existence in which it performs functions similar to those of private corporations.²¹ Under this dichotomy, functions which can be performed adequately only by the government and which are truly governmental in nature are immune from tort liability.²² In contrast, proprietary functions, which include services that could be provided by a private corporation, expose the municipality to liability for its negligence in the same manner as a private corporation.²³

The operation of a police department, a matter of paramount public interest and benefit, traditionally has been recognized as a

of Sovereign and Official Immunity, 25 WAYNE L. REV. 177, 193 (1979). The earliest decision establishing that an individual could not maintain an action against a political subdivision of the state is generally considered to be the English case, *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359 (1788) (better that an individual should sustain an injury than that the public should suffer an inconvenience).

20. W. PROSSER, *THE LAW OF TORTS* § 131 (4th ed. 1971); 18 McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.02 (rev. 3d ed. & Supp. 1982); *see also* 57 AM. JUR. 2D *Municipal, School, and State Tort Liability* § 28 (1971 & Supp. 1982).

21. W. PROSSER, *supra* note 20, § 131; 18 McQUILLIN, *supra* note 20, §§ 53.02, 53.22a-53.59; 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 29-6, at 1619 (1956). *See also* 57 AM. JUR. 2D, *supra* note 20, § 27. In *Bailey v. City of New York*, 3 Hill 531 (1842), New York first declared the distinction between governmental and proprietary functions. At first, the governmental-proprietary distinction generally was accepted in almost every jurisdiction, but it later became subject to heavy criticism. *See* 18 McQUILLIN, *supra* note 20, § 53.02; Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Casner & Fuller, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941); Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); *see also* 57 AM. JUR. 2D, *supra* note 20, § 30.

22. W. PROSSER, *supra* note 20, § 131, at 979. Examples of governmental functions include: the duty to make and enforce appropriate laws and regulations; the exercise of legislative or judicial discretion; the imprisonment of criminals; the maintenance and operation of public schools; and the protection of public health. *Id.* § 131, at 979-80.

23. 18 McQUILLIN, *supra* note 20, § 53.02, at 105. Examples of proprietary functions include such duties as supplying water, gas, or electricity to the public, operating an airport, and operating a municipal garage for profit. W. PROSSER, *supra* note 20, § 131, at 981.

purely governmental activity.²⁴ Accordingly, municipalities generally were held immune from tort liability arising from police law enforcement activity.²⁵

The governmental-proprietary distinction, established by the judiciary to mitigate the harshness of the doctrine of sovereign immunity,²⁶ was an artificial distinction which led to great confusion and irreconcilable conflict.²⁷ This controversy fueled the already widespread criticism of the governmental immunity doctrine²⁸ and led to its abrogation by the legislatures and the courts.²⁹

24. W. PROSSER, *supra* note 20, § 131, at 979; 18 McQUILLIN, *supra* note 20, § 53.22(c).

25. *Id.* See also Dakin, *Municipal Immunity in Police Torts*, 16 CLEV. MAR. L. REV. 448 (1967); Mathes & Jones, *Towards a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889 (1965). Courts have found the following policies persuasive:

- (1) public entities should not be stifled or impeded by the burden or the threat of liability in carrying out their law enforcement duties;
- (2) public funds should not be diverted to the liquidation of private damages;
- (3) police-type entities rarely have funds available to pay damages;
- (4) fraud and excessive litigation would ensue if such entities were made liable, and this would result in unbearable cost to the public;
- (5) the "ancient notion" expressed in the early cases, that it is better for an individual to suffer than for the public to be inconvenienced; and
- (6) the "legalistic" supposition that *respondeat superior* does not apply to municipal or other governmental entities.

Mathes & Jones, *supra*, at 829-93. Notwithstanding this governmental immunity, a police officer may be liable personally for the torts he commits during the performance of his duties. *Gilday v. Hauchwit*, 48 N.J. 557, 226 A.2d 834 (1967); *Benally v. Robinson*, 14 Utah 2d 6, 376 P.2d 388 (1962); *Down v. Swann*, 111 Md. 53, 73 A. 653 (1909). See N.Y. GEN. MUN. LAW § 50-k (McKinney Supp. 1982-1983), which provides for indemnification of city employees in civil actions.

26. 18 McQUILLIN, *supra* note 20, § 53.02, at 104.

27. *Id.* at 105-06. "A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (United States liable under Federal Tort Claims Act for damages caused by negligence of Coast Guard in maintaining lighthouse).

28. 18 McQUILLIN, *supra* note 20, § 53.02, at 104-05. The doctrine was "never completely accepted by the courts, its underlying principle being deemed contrary to the basic concept of the law of torts that liability follows negligence, as well as foreign to the spirit of the constitutional guarantee that every person is entitled to a legal remedy for injuries he may receive." *Id.* at 104.

29. *Id.* at 106-08. See also F. HARPER & F. JAMES, *supra* note 21, § 29.1 n.2 commentary (Supp. 1968); 57 AM. JUR. 2D, *supra* note 20, §§ 60-61, 65-68; Borchard, *State and Municipal Liability in Tort-Proposed Statutory Reform*, 20 A.B.A.J. 747 (1934); Vanlandingham, *Local Governmental Immunity Re-examined*, 61 Nw. U.L. REV. 237 (1966).

For example, in 1920, the New York State Legislature abolished governmental immunity by enacting legislation waiving the state's immunity from liability and consenting to have its liability determined by the rules of law applicable to individuals or private corporations.³⁰ The full effect of this waiver was unclear until 1945 when the New York Court of Appeals decided *Bernardine v. City of New York*.³¹ In *Bernardine*, the plaintiff sued the City of New York to recover damages for personal injuries caused by a runaway police horse.³² The court declared that the waiver of immunity "naturally" extended to municipal corporations, counties, towns, and all other political subdivisions of the state.³³ New York City was held liable for the policeman's negligent act, committed in the course of his duties.³⁴

As the states abolished immunity and no longer adhered to the governmental-proprietary distinction, the courts began to find municipalities liable for torts committed by police officers, usually under the doctrine of respondeat superior.³⁵ The first state appellate court decision to abrogate the rule of municipal immunity was handed down in 1957 by the Florida Supreme Court.³⁶ In *Hargrove v. Town of Cocoa*

30. N.Y. CT. CL. ACT § 8 (McKinney 1963). "In other words, in each case the test now is whether an individual or private corporation, assuming that he or it were obligated to discharge the governmental duty involved, would be liable to the injured person for a breach of that duty." *Runkel v. City of New York*, 282 A.D. 173, 178, 123 N.Y.S.2d 485, 490 (2d Dep't 1953)(emphasis omitted).

31. 294 N.Y. 361, 62 N.E.2d 604 (1945).

32. *Id.* at 364, 62 N.E.2d at 604-05.

33. *Id.* at 365, 62 N.E.2d at 605. The court reasoned:

On the waiver by the State of its own sovereign dispensation, that extension naturally was at an end and thus we were brought all the way round to a point where the civil divisions of the State are answerable equally with individuals and private corporations for wrongs of officers and employees, even if no separate statute sanctions that enlarged liability in a given instance.

Id. (citation omitted). See also Annot., 161 A.L.R. 367; 57 AM. JUR. 2d, *supra* note 20, § 61.

34. *Bernardine*, 294 N.Y. at 367, 62 N.E.2d at 606.

35. See notes 42-63 *infra* and accompanying text for a discussion of respondeat superior. See also 18 McQUILLIN, *supra* note 20, §§ 53.79, 53.79c, 53.79d; Greenstone, *Liability of Police Officers for Misuse of Their Weapons*, 16 CLEV. MAR. L. REV. 397 (1967); Littlejohn, *Civil Liability and the Police Officer: The Need for New Deterrents to Police Misconduct*, 58 U. DET. J. URB. L. 365 (1981); SHAPO, *Municipal Liability for Police Torts: An Analysis of a Strand of American Legal History*, 17 U. MIAMI L. REV. 475 (1963).

36. 18 McQUILLIN, *supra* note 20, § 53.02, at 106; 2 F. HARPER & F. JAMES, *supra* note 21, § 29.1 n.2 commentary at 277 (Supp. 1968).

Beach,³⁷ the court held that a municipal corporation may be liable for the torts committed by a police officer acting within the scope of his employment.³⁸ The court held that an injured party is entitled to redress from the municipality when the injury is proximately caused by the negligence of the police officer.³⁹ Six years later, municipal liability was extended to intentional torts committed by police officers performing their law enforcement duties.⁴⁰

III. Theories of Recovery Against a Municipality

Presently, municipal immunity exists in only a minority of jurisdictions.⁴¹ Most courts apply several theories to find municipalities liable for their own torts as well as for the torts committed by police officers.

A. State Law Tort Claims

1. *Respondeat Superior*

The doctrine of respondeat superior provides that a master is liable for the torts of his servant committed in the course of the servant's employment.⁴² As applied to police shooting cases, the doctrine im-

37. 96 So. 2d 130 (Fla. Sup. Ct. 1957) (en banc). *Hargrove* involved an action by a widow against the city for the alleged wrongful death of her husband who died of smoke suffocation after being jailed while in a helpless state of intoxication and left unattended. *Id.* at 131.

38. *Id.* at 133-34.

39. *Id.*

40. *Simpson v. City of Miami*, 155 So. 2d 829 (Fla. 1963) (city liable for its police officers' intentional tort of assault and battery).

41. 18 McQUILLIN, *supra* note 20, § 53.02; 2 F. HARPER & F. JAMES, *supra* note 21, § 29.1 n.2 commentary (Supp. 1968). See also Note, *Municipal Immunity Developments since Jackson v. Florence*, 5 AM. J. TRIAL ADVOC. 115 (1981) (because the doctrine of municipal liability was judicially created, courts have the power to abolish it; however, legislatures have the power, within constitutional restraints, to provide limitations on liability where they deem necessary).

42. W. PROSSER, *supra* note 20, § 69, at 458. See also RESTATEMENT (SECOND) OF AGENCY, §§ 219, 243 (1958); Brill, *The Liability of an Employer for the Wilful Torts of his Servants*, 45 CHI-KENT L. REV. 1 (1968). The justification for the doctrine of respondeat superior is a "deliberate allocation of risk" and the losses caused by the torts of the employee

are placed upon the employer because, having engaged in an enterprise which will, on the basis of all past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because

poses vicarious liability upon a showing that the master-servant relationship existed, and that the tortious act was committed while the officer was acting within the scope of his duties.⁴³ Liability "extends to any and all tortious conduct" of the police officer that is within the scope of his employment.⁴⁴

Whether a police officer was in fact acting within the scope of his employment is ordinarily a question of fact for the jury.⁴⁵ For example, a city may be held liable for a negligent shooting by a police officer which takes place during the interrogation of suspects since the interrogation is within the officer's employment.⁴⁶ Moreover, a municipality may be liable even for an intentional shooting of an officer which is found to be within the scope of his police duties.⁴⁷

Given the nature of police work, an officer retains his employee status when his tour of active duty ends.⁴⁸ As one court stated, an

he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large. Added to this is the makeweight argument that an employer who is held strictly liable is under the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely.

W. PROSSER, *supra* note 20, § 69, at 459.

43. 18 McQUILLIN, *supra* note 20, §§ 53.65, 53.79. See, e.g., *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820 (1960) (municipality may be liable for injury resulting from the active wrongdoing of a police officer who either intentionally shot the plaintiff or negligently fired his revolver as a warning). In minority jurisdictions, where municipal governmental immunity has not been abrogated and the governmental-proprietary distinction is still in use, the tort of the officer would have to be committed while exercising a ministerial or proprietary function. 18 McQUILLIN, *supra* note 20, § 53.65. See also *Reeves v. City of Jackson*, 608 F.2d 644 (5th Cir. 1979) (city not liable for the torts of its police officers committed while engaged in matters pertaining to the police powers of the city).

44. W. PROSSER, *supra* note 20, § 70 at 460.

45. *Fitzgerald v. McCutcheon*, 270 Pa. Super. 102, 106, 410 A.2d 1270, 1271 (1980) (citation omitted); *Garner v. Saunders*, 281 So. 2d 392, 393 (Fla. 1973); *Kull v. City of New York*, 40 A.D.2d 829, 830, 337 N.Y.S.2d 341, 343 (2d Dep't), *rev'd on dissenting opinion*, 32 N.Y.2d 951, 300 N.E.2d 736, 347 N.Y.S.2d 205 (1973); *Burns v. City of New York*, 6 A.D.2d 30, 33, 174 N.Y.S.2d 192, 196 (1st Dep't 1958).

46. *Wagstaff v. City of Maplewood*, 615 S.W.2d 608 (Mo. App. 1981) (city liable for wrongful death of decedent who was shot by police officer during an interrogation).

47. *McAndrew v. Mularchuk*, 33 N.J. 172, 189, 162 A.2d 820, 829 (1960) (city may be liable for injuries resulting from bullet fired by police officer, allegedly in self-defense).

48. *Fyfe, Always Prepared: Police Off-Duty Guns*, 452 ANNALS 72 (Nov. 1980). See *Burns v. City of New York*, 6 A.D.2d 30, 174 N.Y.S.2d 192 (1st Dep't 1958) (off-duty officer has the authority to arrest narcotics suspect and city may be liable for

officer may be required to perform in his official capacity even while technically off-duty.⁴⁹ To further this end, police officers are either required or permitted to carry a gun at all times.⁵⁰ Therefore, a patrolman's use of his weapon may be within the scope of his employment if his actions are in furtherance of his employer's interests.⁵¹

By contrast, a municipality, as an employer, may not be liable under respondeat superior where the police officer is not performing an act or function beneficial to the city's interest or where the officer is "clearly acting in furtherance of his personal interest";⁵² that is, when

officer's torts committed during the arrest); *Garner v. Saunders*, 281 So. 2d 392 (Fla. 1973) (by virtue of city regulations requiring police officers to be on duty at all times and to possess a gun at all times, city may be liable for torts committed by off-duty police officer).

49. *Collins v. City of New York*, 11 Misc. 2d 76, 78, 171 N.Y.S.2d 710, 713 (Sup. Ct. N.Y. County 1958), *aff'd mem.*, 8 A.D.2d 613, 185 N.Y.S.2d 740 (1st Dep't), *aff'd*, 7 N.Y.2d 822, 164 N.E.2d 719, 196 N.Y.S.2d 700 (1959); *see also* *Burns v. City of New York*, 6 A.D.2d 30, 33, 174 N.Y.S.2d 192, 196 (1st Dep't 1958); *Garner v. Saunders*, 281 So. 2d 392, 393 (Fla. 1973). "In many jurisdictions, off-duty police may be disciplined or prosecuted for failing to respond in an 'appropriate' manner to situations threatening to life, property, or order." Fyfe, *supra*, note 48, at 73.

50. *Kull v. City of New York*, 40 A.D.2d 829, 337 N.Y.S.2d 341, 343 (2d Dep't), *rev'd on dissenting opinion*, 32 N.Y.2d 951, 300 N.E.2d 736, 347 N.Y.S.2d 205 (1973); *Collins v. City of New York*, 11 Misc. 2d 76, 78, 171 N.Y.S.2d 710, 713 (Sup. Ct. N.Y. County 1958), *aff'd mem.*, 8 A.D.2d 613, 185 N.Y.S.2d 740 (1st Dep't), *aff'd*, 7 N.Y.2d 822, 164 N.E.2d 719, 196 N.Y.S.2d 700 (1959); *Burns v. City of New York*, 6 A.D.2d 30, 33, 174 N.Y.S.2d 196-97 (1st Dep't 1958); *Garner v. Saunders*, 281 So.2d 392, 393 (Fla. 1973).

American police almost everywhere are expected to be armed and ready for action. As a 1978 survey of 49 major police departments found, 25 departments—51 per cent—reported permitting officers to carry off-duty guns, and 24-49 percent—reported requiring that officers be armed off duty. None required officers to leave their guns at police stations at the completion of the working day.

Fyfe, *supra* note 48, at 73.

51. *King v. City of Clinton*, 343 S.W.2d 185 (Mo. App. 1961) (gun accidentally discharged when police officer tripped on his way to report to duty); *Collins v. City of New York*, 11 Misc. 2d 76, 171 N.Y.S.2d 710 (Sup. Ct. N.Y. County 1958), *aff'd mem.*, 8 A.D. 2d 613, 185 N.Y.S.2d 740 (1st Dep't), *aff'd*, 7 N.Y. 2d 822, 164 N.E.2d 719, 196 N.Y.S.2d 700 (1959) (police officer accidentally dropped off-duty revolver while on his way to report for duty); *Rives v. Bolling*, 180 Va. 124, 21 S.E.2d 775 (1942) (negligent cleaning of loaded gun while off-duty is within employ). *See also* McQUILLIN, *supra* note 20, § 53.80b; 57 AM. JUR. 2D, *supra* note 20, § 254; Greenstone, *Liability of Police Officers for Misuse of Their Weapons*, 16 CLEV.-MAR. L. REV. 397 (1967).

52. *Collins v. City of New York*, 11 Misc. 2d 76, 79, 171 N.Y.S.2d 710, 713 (Sup. Ct. N.Y. County 1958); *aff'd mem.*, 8 A.D.2d 613, 185 N.Y.S.2d 740 (1st Dep't), *aff'd*, 7 N.Y.2d 822, 164 N.E.2d 719, 196 N.Y.S.2d 700 (1959). *See also* *City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 203 (5th Cir. 1965).

he is acting outside the scope of his employment.⁵³ These exceptions apply whether or not the officer is on- or off-duty and whether or not the act was negligent or intentional.⁵⁴

A police officer is said to have departed from the scope of his employment when his conduct is considered "too outrageous" to be in furtherance of the city's interests.⁵⁵ Actions which have been deemed outside the scope of employment include: a reckless and irresponsible shooting resulting from a police officer's intoxicated and confused condition;⁵⁶ a shooting occurring in connection with an unauthorized arrest;⁵⁷ a shooting resulting from a police officer's independent actions which provoked a disturbance;⁵⁸ and a killing motivated solely by personal reasons.⁵⁹ Although an intentional shooting committed

53. RESTATEMENT (SECOND) OF AGENCY § 228 (1964), defines conduct within the scope of employment as follows:

(1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of the force is not unexpected by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

54. *Pacheco v. City of New York*, 11 Misc. 2d 80, 140 N.Y.S.2d 275, (Sup. Ct. Bronx County 1954), *aff'd*, 285 A.D. 1031, 140 N.Y.S.2d 500 (1st Dep't 1955). *See also* 57 AM. JUR. 2d, *supra* note 20, § 254.

55. *Gambling v. Cornish*, 426 F. Supp. 1153, 1155 (N.D.Ill. 1977). (alleged intentional torts of false arrest, false imprisonment and sexual assault are not within the scope of police officer's employment).

56. *Dzing v. City of Chicago*, 84 Ill. App. 3d 704, 406 N.E.2d 121 (1980) (city not liable for plaintiff's injuries resulting from off-duty police officer shooting his way into plaintiff's apartment). *See also* *Pacheco v. City of New York*, 11 Misc. 2d 80, 140 N.Y.S.2d 275 (Sup. Ct. Bronx County 1954) (plaintiff who joined willingly in the peregrinations of an off-duty policeman on a drunken spree may not hold city liable), *aff'd*, 285 A.D. 1031, 140 N.Y.S.2d 500 (1st Dep't 1955); *Corridon v. City of Bayonne*, 129 N.J. Super. 393, 324 A.2d 42 (1974) (city may not be held liable under respondeat superior theory when intoxicated police officer drew service revolver and shot decedent during an apparently normal conversation).

57. *Charles v. Town of Jeanerette, Inc.*, 234 So. 2d 794 (La. Ct. App. 1970). *See also* *Ellis v. Jordan*, 571 S.W.2d 635 (Ky. Ct. App. 1978); *Sturman v. City of Golden Beach*, 355 So. 2d 453 (Fla. Dist. Ct. App. 1978).

58. *Cheatham v. City of New Orleans*, 368 So. 2d 146 (La. Ct. App. 1979) (shoe-shine boy shouted obscenities at off-duty policeman who then proceeded to manhandle the boy; plaintiff intervened, fight broke out and policeman shot plaintiff).

59. *Fitzgerald v. McCutcheon*, 270 Pa. Super. 102, 410 A.2d 1270 (1979). After getting into an argument with his neighbor, the intoxicated off-duty policeman shot his neighbor six times with a gun that had not been issued or registered to him by the

within the scope of police duties will not preclude a finding of liability against the city,⁶⁰ an intentional killing wholly unrelated to the performance of a police officer's official duties will.⁶¹ Moreover, in jurisdictions where governmental immunity prevails, the plaintiff must prove that the police officer was engaged in a proprietary function when the injury occurred.⁶² This is a difficult burden of proof because police activities generally have been held to be governmental functions.⁶³

Respondeat superior, therefore, has a limited application to cases involving police shootings. For municipal liability to exist, the plaintiff must prove that the officer was acting within the scope of his employment or in furtherance of the police department's interests at the time of the shooting.

2. *Municipal Negligence*

A plaintiff injured by an intentional act of a police officer may seek to recover from the police officer's employer, the municipality, by

police department. The court stated that the policeman's acts "were motivated by reasons personal to himself and did not further the purpose of his employment as a policeman." Moreover, the

act was so outrageous, so criminal, and so incapable of anticipation by his employer, that it must be held as a matter of law to exceed the scope of McCutcheon's employment. To hold a municipality liable for conduct of an off duty policeman under the circumstances of this case on a theory of respondeat superior would be unreasonable and would exceed the legitimate legal and social purposes which sustain the doctrine.

Id. at 107, 410 A.2d at 1272. *See also* Honeycutt v. Town of Boyce, 366 So. 2d 640 (La. Ct. App. 1978) (killing by police officer resulting from a long standing personal vendetta); Snell v. Murray, 117 N.J. Super. 268, 284 A.2d 381 (Super. Ct. Law Div. 1971), *aff'd*, 121 N.J. Super. 215, 296 A.2d 538 (Super. Ct. App. Div. 1972) (city not liable for bullet wound since police officer was furthering his own illegal ends by extorting proceeds of dice-game). A premeditated murder committed by a police officer has been held to be outside the scope of employment as a matter of law. Kyreacos v. Smith, 89 Wash. 2d 425, 429-30, 572 P.2d 723, 725 (1977). The police officer had previously been convicted of premeditated murder and the court reasoned that it would be illogical to permit a civil jury to conclude otherwise. *Id.*

60. Burns v. City of New York, 6 A.D.2d 30, 174 N.Y.S.2d 192 (1st Dep't 1958) (plaintiff shot by off-duty policeman engaged in search for narcotics law violators); Shipley v. City of South Bend, 372 N.E.2d 490 (Ct. App. 1978) (reasonable, deliberate use of deadly force by police officer does not constitute assault and battery).

61. Garcia v. City of New York, 87 A.D.2d 643, 448 N.Y.S.2d 747 (2d Dep't 1982).

62. 18 McQUILLIN, *supra* note 20, § 53.65.

63. Bartashevich v. City of Portland, 308 A.2d 551 (1973). *See also* notes 24-25 *supra* and accompanying text.

alleging negligence⁶⁴ on the part of the municipality.⁶⁵ The municipality's negligence derives from two theories: (1) negligent hiring or retention; or (2) inadequate training. Under the municipal negligence theory, the focus is on the negligence of the municipality through its police department, rather than on the imputed negligence of the officer. Thus, the city is held directly liable for the wrongful act in contrast with the vicarious liability imposed under respondeat superior.⁶⁶ Therefore, liability may be imposed under a negligence theory in situations where the respondeat superior doctrine precludes liability by its "scope of employment" requirement.

a. Negligent Hiring or Retention

Liability may be imposed upon a municipality under the theory of negligent hiring or retention where a city has retained an officer whose past history has or should have placed the municipality on notice⁶⁷ of the officer's propensity for violence or instability.⁶⁸ In such cases, the officer's continued employment creates a risk of bodily harm to others which the city should anticipate and is obliged to abate.⁶⁹

64. A cause of action for negligence requires proof of:

1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on his part to conform to the standard required. . . .
3. A reasonable close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause" or "proximate cause."
4. Actual loss or damage resulting to the interests of another. . . .

W. PROSSER, *supra* note 20, § 30, at 143.

65. 18 McQUILLIN, *supra* note 20, § 53.16. The plaintiff must prove that it was the negligence of the municipal corporation that was the proximate cause of the plaintiff's injuries. The established rules of negligence generally are applied and the existence of negligence on the part of the city is a question of fact for the jury. *Id.*

66. *Fernelius v. Pierce*, 22 Cal.2d 226, 233-34, 138 P.2d 12, 17 (1943) (city may be liable for wrongful death of prisoner beaten by police officer).

67. *Snell v. Murray*, 117 N.J. Super. 268, 274, 284 A.2d 381, 385 (Super. Ct. Law Div. 1971) (mere fact that the city entrusted the police officer with a pistol would not impose liability unless the city had knowledge of a propensity towards violent conduct), *aff'd*, 121 N.J. Super. 215, 296 A.2d 538 (Super. Ct. App. Div. 1972). The necessary notice may be either actual or constructive notice. *See McCrink v. City of New York*, 296 N.Y.99, 106, 71 N.E.2d 419, 422 (1947).

68. *McCrink v. City of New York* 296 N.Y. 99, 106, 71 N.E.2d 419, 422 (1947).

69. *Id.* at 103, 106, 71 N.E.2d at 420, 422. *See City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 201 (5th Cir. 1965) (it must be shown that this known risk, and municipality's failure to guard against it in retaining officer, was the proximate cause of injury).

Courts apply the negligent hiring or retention theory without regard to whether an officer's act is within the scope of his employment.⁷⁰

To state a cause of action on a theory of negligent hiring or retention, the plaintiff must prove that: (1) an employment relationship existed; (2) the employee was incompetent; (3) the employer had actual or constructive knowledge of the employee's incompetence; (4) the employee's negligence caused the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee was the proximate cause of the plaintiff's injury.⁷¹ The city also must disclose the police officer's personnel file so that previous misconduct by the officer may be discovered.⁷²

An action was brought under the negligent hiring or retention theory in *McCrink v. City of New York*.⁷³ *McCrink* involved a police officer who, while off-duty and admittedly intoxicated, shot and killed one person and seriously wounded another.⁷⁴ The officer's assault was unprovoked.⁷⁵ The evidence included police records of several departmental disciplinary proceedings against the officer involving intoxication.⁷⁶ The New York Court of Appeals held the city liable, noting that the police commissioner had testified "that a revolver in the hands of a drunken person is fraught with potential danger."⁷⁷

70. *McCrink v. City of New York*, 296 N.Y. at 102-03, 71 N.E. 2d at 420.

71. Comment, *Negligent Hiring and Negligent Entrustment: The Case Against Exclusion*, 52 OR. L. REV. 296, 298 (1973); 2 AM. JUR. PROOFS OF FACTS 2d 614, 615. See Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT L. REV. 717 (1977). See also 2 AM. JUR. PROOF OF FACTS 2d 614, 616-18 for advantages of an action based on negligence in hiring or retaining employees over one based on respondeat superior; Comment, *supra*, for a discussion of pleading in the alternative the negligent hiring theory and the respondeat theory. Some jurisdictions have held that the theories must be stated separately. See, e.g., *Tuite v. Union Pac. Stages, Inc.*, 204 Or. 565, 574-76, 284 P.2d 333, 337-38 (1955).

72. *Watson v. Mix*, 38 A.D.2d 779, 328 N.Y.S.2d 161 (4th Dep't 1972). *Contra City of Los Angeles v. Superior Court for County of Los Angeles*, 33 Cal. App. 3d 778, 786, 109 Cal. Rptr. 365, 370 (Ct. App. 1973) (need for confidentiality of police personnel records outweighs need for disclosure to private litigants). The necessary precipitous misconduct can have occurred either while on the police force, as was true in *McCrink*, or prior to the police officer's employment. *Peters v. Bellinger*, 22 Ill. App. 2d 105, 159 N.E.2d 528 (1959) (city negligent for not checking record before hiring where record would have indicated conviction of grand larceny and involvement in street brawls).

74. *Id.* at 102-03, 71 N.E.2d at 419-20.

75. *Id.* at 102, 71 N.E.2d at 419.

76. *Id.* at 104, 71 N.E.2d at 420-21.

77. *Id.* at 105, 71 N.E.2d at 421. See also *Baker v. City of New York*, 25 A.D.2d 770, 269 N.Y.S.2d 515 (2d Dep't 1966) (although the city required plaintiff's husband

The application of the negligent hiring or retention theory is unavailable in jurisdictions where governmental immunity prevails. Courts in those jurisdictions have held that knowledge of prior misconduct or incompetence will not render the municipality liable,⁷⁸ even where a police officer is known to be "notoriously" incompetent.⁷⁹

b. Inadequate Training

A municipality may be liable for an unjustified or negligent shooting by a police officer under the inadequate training theory if the shooting is chargeable to a lack of training or experience.⁸⁰ To establish liability on the part of a municipality for inadequate training, a plaintiff must prove all the elements of a negligence action: duty, breach of duty, proximate cause, and injury.⁸¹ The inadequate training theory applies to on-duty shootings as well as to off-duty shootings where the police officer is required to be armed while off-duty.⁸² As with the negligent hiring or retention theory, an officer's actions committed outside the scope of his employment may not preclude a finding of liability against the municipality.⁸³

to surrender his service revolver, it did not divest him of his capacity to own and possess a revolver). RESTATEMENT (SECOND) OF TORTS § 307 (1964) recognizes that if an instrumentality (the police officer) is used which the actor (the municipality) knows is incompetent and involves an unreasonable risk of harm to others, the actor will be held negligent. See generally 18 McQUILLIN, *supra* note 20, § 53.78 ("the city may not with impunity retain in service an employee from whose retention danger to others reasonably may be anticipated").

78. Luvaul v. City of Eagle Pass, 408 S.W.2d 149, 153 (Tex. Civ. App. 1966); Stouffer v. Morrison, 400 Pa. 497, 502, 162 A.2d 378, 381 (1960).

79. McIlhenny v. City of Wilmington, 127 N.C. 146, 37 S.E. 187 (1900) (city not liable for plaintiff's injuries resulting from blow from police officer's club).

80. McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960). See notes 84-87 *infra* and accompanying text for a discussion of the case.

81. See note 74 *supra*. See, e.g., District of Columbia v. Davis, 386 A.2d 1195, 1200-01 (D.C. 1978) (expert testimony concerning standard of care and proximate cause required to support allegation of municipality's failure to provide adequate firearm training).

82. Meistinsky v. City of New York, 285 A.D. 1153, 140 N.Y.S.2d 212 (2d Dep't 1955) (city liable for on-duty shooting), *aff'd mem.*, 309 N.Y. 998, 132 N.E.2d 900 (1956); Peer v. City of Newark, 71 N.J. Super. 12, 176 A.2d 249 (Super. Ct. App. Div. 1961) (city liable for off-duty shooting where officer was ordered to carry his revolver during off-duty hours).

83. Strachan v. Kitsap County, 27 Wash. App. 271, 277, 616 P.2d 1251, 1255 (1980) (although the officer's act was beyond the scope of his employment, whether it was a proximate result of the county's alleged negligence in failing to require firearms instruction was a question of fact).

A cause of action based upon the inadequate training theory was asserted in *McAndrew v. Mularchuk*.⁸⁴ In *McAndrew*, the Supreme Court of New Jersey held that a city may be liable for the injuries to a plaintiff struck by a bullet fired by a reserve patrolman.⁸⁵ The court, warning that municipalities must take cognizance of the hazard of requiring police officers to carry dangerous instruments and the ensuing risk to the public from that requirement,⁸⁶ held that municipalities have a duty "to use care commensurate with the risk to see to it that such persons are adequately trained or experienced in the proper handling and use of the weapons they are to carry."⁸⁷

Subsequent decisions have refined and expanded the *McAndrew* decision. In *Peer v. City of Newark*,⁸⁸ the Superior Court of New Jersey stressed that *McAndrew* should not be limited to cases where there is a total lack of training, but also should include the issue of the adequacy of the training.⁸⁹ *McAndrew* limited a municipality's liability to circumstances in which there was a negligent *commission* of an act—permitting an inadequately trained police officer to go on duty.⁹⁰ In *Meistinsky v. City of New York*,⁹¹ the New York Court of Appeals held that a municipality can be found negligent for its *omission*—failing to adequately train a police officer in the use of small fire-

84. 33 N.J. 172, 162 A.2d 820 (1960).

85. *Id.* at 196, 162 A.2d at 833. The reserve partolman, who could be pressed into service by the chief of police when needed, was required to carry a gun while on duty, never questioned about his ability to use a gun, never given instruction in handling or shooting the gun, and never given target practice. *Id.* at 176-77, 185, 162 A.2d at 823, 827.

86. *Id.* at 183-84, 162 A.2d at 826-27. *See also* *Steward v. Borough of Magnolia*, 134 N.J. Super. 312, 322-23, 340 A.2d 678, 684 (Super. Ct. App. Div. 1975) ("[o]ur courts have universally regarded loaded firearms as dangerous instruments and have prescribed an elevated degree of reasonable care and caution to be exercised in their use").

87. *McAndrew*, 33 N.J. at 184, 162 A.2d at 827. *See also* *Sager v. City of Woodland Park*, 543 F. Supp. 282, 298 (D. Colo. 1982) (risks created by a city's failure to adequately train its police officers were unreasonable as a matter of law).

88. 71 N.J. Super. 12, 176 A.2d 249 (Super. Ct. App. Div. 1961). In *Peer*, while an off-duty police officer was using toilet facilities, his service revolver discharged and seriously injured the infant plaintiff in the adjoining apartment. The police officer's training was alleged to be inadequate in that there was no adequate instruction on off-duty safety procedures, including the type of holster to be used and how to carry the gun, nor was there any retraining program. *Id.* at 18, 176 A.2d at 252.

89. *Id.* at 24, 176 A.2d at 255.

90. 33 N.J. at 184, 162 A.2d at 827.

91. 285 A.D. 1153, 140 N.Y.S.2d 212 (2d Dep't 1955), *aff'd mem.*, 309 N.Y. 998, 132 N.E.2d 900 (1956).

arms.⁹² It appears, however, that if an officer used his weapon for the commission of a crime, the inadequate training theory would not apply.⁹³ The officer's act would be an "unforeseeable superseding intervening cause" which would break the causal chain and preclude municipal liability.⁹⁴ Moreover, in jurisdictions where governmental immunity has not been abrogated, the inadequate training theory may not be successful because police training is considered a governmental function.⁹⁵

B. 42 U.S.C. Section 1983

In addition to state law tort causes of action,⁹⁶ a plaintiff has a federal remedy under 42 U.S.C. §1983⁹⁷ against a municipality for damages resulting from police misconduct. In *Monell v. Department of Social Services*,⁹⁸ the Supreme Court established a new cause of action⁹⁹ in federal civil rights litigation by finding municipal liability

92. *Id.*

93. *See* Snell v. Murray, 121 N.J. Super 215, 296 A.2d 538 (Super. Ct. App. Div. 1972). Although there was no proof offered on the charge of inadequate training, the court stated: "Obviously he knew and did not have to be told that his weapon was not to be used for the commission of an armed robbery or extortion." *Id.* at 217, 296 A.2d at 539.

94. Sager v. City of Woodland Park, 543 F. Supp. 282, 298 (D. Colo. 1982).

95. *See, e.g.,* Berger v. City of Berkley, 87 Mich. App. 361, 368, 275 N.W.2d 2, 4 (1978) (no distinction made between cases where officer's actions were committed while on routine police duty and cases where wrongful action took place during a training exercise since both are governmental functions).

96. *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.") *rev'd in part on other grounds*, *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).

97. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

98. 436 U.S. 658 (1978).

99. In *Monell*, the Supreme Court held that municipalities were subject to suit under § 1983 and thereby expressly overruled its earlier decision in *Monroe v. Pape*, 365 U.S. 167 (1961). *Monell*, 436 U.S. at 690. In *Monroe*, the Court had held that a municipality was not a "person" under § 1983. 365 U.S. at 191. *See generally* Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213 (1979); Seng, *Municipal Liability for Police Misconduct*, 51 MISS. L.J. 1 (1980); Smith, "New Liability" of *Monell v. Dept. of Social Services of New York*, 6 TEX. S. L. REV. 111 (1981); Note, *Monell & Owen In The Police Injury Context: Municipal Liability Under Section 1983 Without Supervisorial Fault*, 16 U.S.F.L. REV. 517 (1982).

where a constitutional violation or deprivation results from a formal or informal policy or custom of the entity.¹⁰⁰

Specifically, a plaintiff proceeding against a municipality under section 1983 must establish two essential elements. First, that the conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States¹⁰¹ and, second, that the deprivation was caused by an official policy, regulation, custom, or usage of the municipality.¹⁰²

The determination of the first element, whether a constitutional deprivation has in fact occurred, is made on a case-by-case basis.¹⁰³ In police shooting cases, the alleged deprivation suffered by the plaintiff is a deprivation of liberty or life without due process of law.¹⁰⁴ Yet, not all injuries caused by police action will be cognizable under section 1983. There are many individual rights which are protected by the states rather than by the federal constitution, including the right to be secure from harm to person, reputation and property.¹⁰⁵ Section 1983 is not a general tort statute and liability will be imposed only for those rights secured by the constitution and laws of the United States.¹⁰⁶

100. *Monell*, 436 U.S. at 694.

101. *Martinez v. California*, 444 U.S. 277, 284, *reh'g denied*, 445 U.S. 920 (1980). The Court observed that the first inquiry in any § 1983 suit is whether a deprivation of a constitutional right has occurred. *See also* *Baker v. McCollan*, 443 U.S. 137, 140 (1979). "A negative answer to that question will dispose of the plaintiff's claim without the Court ever reaching the issue of whether that challenged conduct was under color of state law or constituted state action." *CIVIL ACTIONS AGAINST STATE GOVERNMENT* 411 (Shepard's/McGraw-Hill 1982).

102. *Monell*, 436 U.S. at 694. *See also* Comment, *Municipal Liability for Torts Committed by Volunteer Anticrime Groups*, 10 *FORDHAM URB. L.J.* 595, 599-615 (1982) (thorough discussion of municipal liability under § 1983).

103. *See, e.g.*, *Roberts v. Marino*, 656 F.2d 1112, 1114 (5th Cir. 1981); *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980).

104. *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (plaintiff suffered injuries when struck by police officer with nightstick). In *Shillingford*, the court stated: "The right to be free of state occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process." *Id.* *See* S. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION—A GUIDE TO § 1983*, § 3.08 (1979). *See also* *LaRocco v. City of New York*, 468 F. Supp. 218, 219 (E.D.N.Y. 1979) (depriving plaintiff of his constitutional rights in violation of § 1983); *Stengel v. Belcher*, 522 F.2d 438, 439-40 (6th Cir. 1975) (for violations of the civil rights of the plaintiffs to due process and equal protection of the laws); *Duchesne v. Sugarman*, 566 F.2d 817, 824 n.18 (2d Cir. 1977) (the determination of whether there has been a constitutional deprivation was decided as a matter of law because the essential facts were undisputed).

105. *Johnson v. Hackett*, 284 F. Supp. 933, 939 (E.D. Pa. 1968).

106. *Shillingford v. Holmes*, 634 F.2d 263, 264 (5th Cir. 1981).

In *Monell*, the Court held that to establish the second element of constitutional deprivation, the plaintiff must show that a municipality's official or unofficial policy or custom caused the injury.¹⁰⁷ Under the *official* policy or custom rationale, the injury must result from an action that implements or executes an officially adopted or promulgated regulation, ordinance, policy statement or decision.¹⁰⁸ By contrast, under the *unofficial* policy or custom rationale, the injury may result from an action taken pursuant to a governmental custom, which is neither formally approved nor authorized by written law, but is "so permanent and well settled as to constitute a 'custom or usage' with the force of law."¹⁰⁹

In addition, *Monell* held that a municipality cannot be vicariously liable under section 1983 on a respondeat superior theory.¹¹⁰ Thus, a municipality cannot be held vicariously liable under section 1983 solely because it employs a tortfeasor.

Section 1983 was relied upon by the plaintiff in *LaRocco v. City of New York*.¹¹¹ The United States District Court for the Eastern District of New York held that New York City was not liable¹¹² under section 1983 for damages resulting from a shooting outside New York City by an off-duty policeman.¹¹³ The court reasoned that neither an official or unofficial policy nor a custom of the city caused the alleged injury.¹¹⁴

In *LaRocco*, the plaintiff asserted that the alleged constitutional deprivation stemmed from the city's policy requiring police officers, whether on- or off-duty, to carry weapons at all times and to inter-

107. *Monell*, 436 U.S. at 690-91.

108. *Id.* at 690.

109. *Id.* at 691 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)).

110. *Monell*, 436 U.S. at 691. *Monell's* rejection of respondeat superior as a basis for municipal liability has been criticized. See, e.g., Schnapper, *supra* note 99, at 215; Smith, *supra* note 99, at 121-29; *Respondeat Superior Liability of Municipalities for Constitutional Torts after Monell: New Remedies to Pursue?*, 44 Mo. L. Rev. 514 (1979).

111. 468 F. Supp. 218 (E.D.N.Y. 1979).

112. *Id.* at 220. As *Monell* made clear, there must be conduct by the city that subjects a person to a denial of a constitutional right. The municipality is to be liable for its own wrongful action or perhaps knowing omission, distinct from the wrongful actions of a municipal employee. *Monell*, 436 U.S. at 694.

113. Officer LaRocco shot and wounded the plaintiff during an arrest for unlawful operation of an automobile. 468 F. Supp. at 219.

114. *Id.* at 220.

vene in disturbances of the peace.¹¹⁵ The court, relying on the incident's occurrence outside the city limits, stated that "[b]y no stretch of the imagination" could the shooting "be viewed as implementing or executing a policy statement or regulation officially adopted by the city."¹¹⁶ The police regulation required officers to carry guns at all times within the city. Therefore, LaRocco was "not obliged to be armed" at the time of the shooting.¹¹⁷

The court also rejected the plaintiff's alternative reliance on the *unofficial* policy or custom rationale of *Monell*.¹¹⁸ The plaintiff had argued that even if official city policy did not require police officers to be armed while off-duty outside the city, the requirement was at least customary.¹¹⁹ The court, in rejecting this argument, stated that "it was not [the] execution of the custom, but [the police officer's] possible abuse of the privilege, that inflicted the injury. . . ." ¹²⁰

A victim of a police shooting also may seek to hold a police officer individually liable under section 1983.¹²¹ To prove individual liability, a plaintiff must establish that the conduct complained of was committed by a person acting under color of state law and that the conduct deprived the plaintiff of a right, privilege or immunity secured by the constitution or laws of the United States.¹²²

Individual liability of a police officer under section 1983 was at issue in *Stengel v. Belcher*.¹²³ The Sixth Circuit held that an off-duty, out-of-uniform police officer was personally liable for his intervention in a barroom brawl which resulted in his shooting several persons.¹²⁴ The court found that this action was under color of state law.¹²⁵ The court rejected the defendant's arguments that he was acting as a

115. *Id.* (citing *New York City Police Department Patrol Guide*, Section 105-1 ("Equipment Firearms")). See note 140 *supra*.

116. *LaRocco*, 468 F. Supp. at 220.

117. *Id.*

118. See text accompanying note 115 *supra*.

119. *LaRocco*, 468 F. Supp. at 220.

120. *Id.* The court reasoned that "[t]o accept plaintiff's argument would be tantamount to holding the city vicariously liable for a tortious act of its employee, a result the Supreme Court in *Monell* expressly declined to permit." *Id.* See note 110 *supra* and accompanying text.

121. *Layne v. Sampley*, 627 F.2d 12 (6th Cir. 1980); *Stengel v. Belcher*, 522 F.2d 438 (6th Cir. 1975).

122. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

123. 522 F.2d 438 (6th Cir. 1975).

124. *Id.* at 441.

125. *Id.* at 439-41.

private citizen.¹²⁶ The court reasoned that although private acts of police officers fall outside section 1983,¹²⁷ the officer was acting under color of law because he intervened "pursuant to a duty imposed by police department regulations."¹²⁸ Finally, the court stated: "It is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law."¹²⁹

The foregoing cases illustrate that section 1983 may be relied upon in two distinct causes of action. First, a plaintiff may bring an action alleging municipal liability for injuries resulting from a police shooting. The plaintiff must prove that either an official or unofficial policy or custom of the municipality caused the injury, resulting in a constitutional deprivation. Second, a plaintiff may bring an action alleging an officer's individual liability. The plaintiff must then prove that at the time of the constitutional deprivation, the officer was acting under color of state law.

126. The defendant argued "that he was engaged in private social activity, was out of uniform and off duty and never identified himself as a police officer." *Id.* at 441.

127. *Id.* (citing *Screws v. United States*, 325 U.S. 91 (1945)). In *Screws*, the Court made a distinction between cases where a police officer is not authorized to act, but nevertheless takes action, and where the officer is authorized, but exceeds the limits of his authority:

They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea.

Id. at 111.

128. *Stengel*, 522 F.2d at 441.

129. *Id.* (quoting *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1968)). The *Stengel* court reasoned that because the defendant had intervened pursuant to police department regulations imposing a continuing duty on police officers, and because he had a gun and a can of chemical mace which he was required by police regulations to carry at all times, he was acting at the time of the shooting under color of state law as a matter of law. *Stengel*, 522 F.2d at 441. The court did concede, however, that the police officer overstepped his bounds and used poor judgment. *Id.* at 441-42.

The United States Supreme Court originally granted certiorari in *Stengel*. *Belcher v. Stengel*, 425 U.S. 910 (1976). However, the Court dismissed the writ as improvidently granted because the question framed in the petition was not in the facts as presented by the record then before the Court. *Belcher v. Stengel*, 429 U.S. 118 (1976). The question presented to the Court read:

IV. *Bonsignore v. City of New York*

The importance of the Second Circuit Court of Appeal's recent decision in *Bonsignore v. City of New York*¹³⁰ lies not only in its expansion of the negligence theories of municipal liability,¹³¹ but also in the court's treatment of the plaintiff's section 1983 claim.¹³² In *Bonsignore*, the plaintiff brought an action against New York City based upon two negligence theories, one similar to the hiring or retention theory and the other to the inadequate training theory.¹³³ Although a claim under 42 U.S.C. §1983 was rejected,¹³⁴ the Second Circuit affirmed a judgment against the city holding it liable for personal injuries resulting from its negligent failure to adopt adequate programs to detect police officers who are unfit to carry guns.¹³⁵

On December 20, 1976, officer Blase Bonsignore, a twenty-three year veteran of the New York City Police Department,¹³⁶ shot and

Does the fact that an off-duty police officer, out of uniform, is required by police department regulation to carry a weapon at all times, establish that *any* use of that weapon against the person of another, even though the officer is engaged in private conduct at the time, [is] an act "under color of law" within the meaning of 42 U.S.C. § 1983?

Id. at 119 (emphasis added) (quoting question presented in the petition for certiorari). Chief Justice Burger explained in his concurring opinion that the Court had originally granted certiorari because the question posed had limited the state action to the requirement that the defendant wear a gun at all times; not that defendant had intervened pursuant to a police regulation requiring such intervention. He pointed to three contemporaneous factors, which in addition to possession of the gun, colored the officer's conduct as official:

(1)The officer testified that he had formed an intention that he would arrest at least two of the men when he stood up to intervene in the altercation; (2) he intervened by using a can of mace issued to him by the police department; (3) he was acting pursuant to a police regulation which required his intervention in any disturbance of the peace, whether he was on or off duty.

429 U.S. at 120. The Chief Justice emphasized that "it is unclear what the result would have been had the only contemporaneous evidence of state action been the presence of the state-required gun. *Id.* See also *Layne v. Sampley*, 627 F.2d 12 (6th Cir. 1980) (police officer's actions held to be under color of state law based on contemporaneous factors in addition to the authorization to carry a gun while off-duty).

130. 521 F. Supp. 394 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 635 (2d Cir. 1982).

131. See notes 177-85 *infra* and accompanying text.

132. See notes 186-89 *infra* and accompanying text.

133. See text accompanying note 147 *infra* and note 148 *infra*.

134. *Bonsignore*, 683 F.2d at 638-39.

135. *Id.* at 638.

136. *Bonsignore*, 521 F. Supp. at 396.

seriously wounded his wife¹³⁷ and committed suicide by shooting himself in the head with his .32 caliber "off-duty" revolver.¹³⁸ The plaintiff, Bonsignore's wife, alleged that the City of New York was negligent: (1) in requiring a potentially unfit¹³⁹ officer to carry a gun,¹⁴⁰ and (2) in failing to adopt a program that would have identified the officer as unfit to carry a gun.¹⁴¹ The plaintiff further alleged that the city's negligence caused her injuries¹⁴² and her husband's wrongful death.¹⁴³

The jury rejected the plaintiff's wrongful death claim against the city¹⁴⁴ but awarded her compensatory and punitive damages based

137. *Id.* The plaintiff sustained brain damage and serious motor dysfunction as a result of being struck by five bullets, several fragments of which remained in her body. *Id.*

138. *Id.*

139. *Id.* at 399. Bonsignore had been assigned the position of precinct attendant or "broom" which is classified as a limited-duty assignment and usually indicates a mental or physical disability. *Id.* at 399. The district court refers to Bonsignore's mental illness. *Id.* at 396. The Second Circuit's decision is premised on the fact that Bonsignore was unfit to carry a gun. *Bonsignore*, 683 F.2d at 638.

140. *Bonsignore*, 521 F. Supp. at 396. On December 26, 1976, there was a requirement in effect that each New York City police officer carry his gun on person 24 hours, even when off-duty. See *New York City Police Department Patrol Guide*, Section 105-1 ("Equipment Firearms") which states in part:

1. Be armed at all times when in the City of New York, unless otherwise directed, with:
 - a. Service Revolver (See 105-4) or
 - b. Off duty revolver - Smith and Wesson or Colt double action calibre .38 Special revolver, with a barrel at least two (2) inches in length, military (Patridge) sights, blued parkerized finish and wooden stock.

There is no question that this requirement is of major significance to this case. For cases in which this requirement was a factor, see *McCrink v. City of New York*, 296 N.Y. 99, 71 N.E.2d 419 (1947); *Kull v. City of New York*, 40 A.D.2d 829, 337 N.Y.S.2d 241 (2d Dep't), *rev'd on dissenting opinion*, 32 N.Y.2d 951, 300 N.E.2d 736, 347 N.Y.S. 2d 205 (1973); *Burns v. City of New York*, 6 A.D.2d 30, 174 N.Y.S.2d 192 (1st Dep't 1958); *Collins v. City of New York*, 11 Misc. 2d 76, 171 N.Y.S.2d 710 (Sup. Ct. N.Y. County 1958), *aff'd mem.*, 8 A.D.2d 613, 185 N.Y.S.2d 740 (1st Dep't), *aff'd*, 7 N.Y. 2d 882, 164 N.E.2d 719, 196 N.Y.S.2d 700 (1959); *Hacker v. City of New York*, 46 Misc. 2d 1003, 261 N.Y.S.2d 751 (Sup. Ct. Bronx County 1965), *rev'd*, 26 A.D.2d 400, 275 N.Y.S.2d 146 (1st Dep't) 1966), *aff'd*, 20 N.Y.2d 722, 229 N.E.2d 613, 283 N.Y.S.2d 46 (1967), *cert. denied*, 390 U.S. 1036 (1968).

141. *Bonsignore*, 521 F. Supp. at 398.

142. *Id.*

143. *Id.* at 396.

144. *Id.* On appeal, the city argued that the jury's verdict awarding damages on the negligence claim but denying recovery on the wrongful death claim was so inconsistent that the district court erred in denying their motion for judgment n.o.v. or, in the alternative, a new trial. The Second Circuit stated: "This claim is without

upon her personal injury claim.¹⁴⁵ The United States District Court for the Southern District of New York held that a reasonable jury could have concluded that the plan adopted by the city for screening officers was unreasonable and that its negligence in adopting the plan caused the plaintiff's injuries.¹⁴⁶

A. The Negligence Issues

At trial, the evidence was submitted to the jury on two theories of negligence under New York law: "whether 'under the circumstances [the city] should have known that Mr. Bonsignore was dangerous and should not have been permitted to carry a gun' or whether the city had failed to 'adopt or implement a sufficiently effective program of psychological screening and monitoring of police officers.'" ¹⁴⁷ The jury based its finding of negligence on the second ground.¹⁴⁸

merit. While the jury could have concluded that the City's failure to adopt a reasonable program to screen violence-prone officers was the proximate cause of Mrs. Bonsignore's injuries, the jury also could have concluded that Officer Bonsignore would have committed suicide even if the City had identified him as a problem officer and had removed his gun." *Bonsignore*, 683 F.2d at 638.

145. *Bonsignore*, 521 F. Supp. at 636. The plaintiff was awarded \$300,000 in compensatory damages and \$125,000 in punitive damages. The plaintiff moved for a new trial, claiming the compensatory damage award was inadequate. The district court denied the motion, reasoning that the amount awarded was not so unreasonable as to justify setting aside the verdict.

The city moved for judgment notwithstanding verdict or alternatively for a new trial, maintaining that the verdict was not supported by the evidence and was unreasonable as a matter of law. *Bonsignore*, 683 F.2d at 636. The district court pointed out that the city faced a difficult burden in seeking to set aside the jury's verdict and stated that defendant undermined its position by offering "virtually no defense at trial." *Bonsignore*, 521 F. Supp. at 396.

146. *Id.* at 397.

147. *Bonsignore*, 683 F.2d at 637.

148. *Id.* The jury was instructed that the city could be found liable on this ground either if the city had failed to address the problem, or if it had adopted measures a reasonable person could find deficient, but not "merely because the system that [the city] chose seems insufficient or imperfect or because the jury would have chosen a different system." This instruction was based on several New York decisions which have held that when a jury reviews a determination of a governmental planning board for tort liability, it should not substitute its own judgment for that of the planning body; rather it should find liability only if there is proof that the plan was the product of inadequate study or that it lacked any reasonable basis. *Bonsignore*, 521 F. Supp. at 397 (citing *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960) (action against city for injuries arising out of automobile accident allegedly caused by negligent design by city in the clearance interval between changing of traffic lights); *Southworth v. New York*, 62 A.D.2d 731, 405 N.Y.S.2d 548 (4th Dep't 1978), *aff'd*, 47 N.Y.2d 874, 392 N.E.2d 1254, 419 N.Y.S.2d 71 (1979) (action against the state for injuries and death sustained as a result of accident allegedly caused by the negligent establishment and operation of an experimental

drivers' rehabilitation program); *Santangelo v. State of New York*, 103 Misc. 2d 578, 426 N.Y.S.2d 931 (Ct. Cl. 1980) (action against state for personal injuries sustained when raped by prisoner released under temporary release program)).

The jury denied recovery on the first ground of negligence, that the city knew or should have known that *Bonsignore* was dangerous and should not be permitted to carry a gun. The district court stated: "This claim of negligence because of actual or constructive knowledge of danger was the subject of substantial testimony at trial, but the evidence (although un rebutted by defendant) was highly speculative and circumstantial." *Bonsignore*, 521 F. Supp. at 398 n.1. This claim is similar in reasoning to the negligent hiring or retention theory of negligence.

149. *Id.* The EWS was established in April 1973 to identify problem officers, those officers who were "marginal performers, violence prone, or evidenced some kind of emotional problem." Record at A475, *Bonsignore*. The EWS was established in reaction to the fatal shooting of a ten-year old black youth which resulted in community unrest and the dismissal of the officer involved. The Police Department discovered that the officer had been involved in prior similar situations in various parts of the city. The Department determined that a central repository was needed to consolidate material which would alert the department to officers who might be violence prone. The Violence Prone Task Force was created and given a mandate to detect violence prone policemen thought to be a danger to themselves and the public. These officers were to be reassigned from patrol to nonpatrol positions. The task force conducted a nine-month intensive review of 30,832 personnel files, applying criteria developed to detect personnel with personal problems, ranging from poor police performance to violent and criminal acts. This "violence prone list" included the following indicators: marriage and family difficulties, financial problems, drug or alcohol addiction problems, psychopathology, socialization problems, training problems, and conflicts with supervisors. In addition, each commanding officer was required to select five police officers under his command believed to have potential behavioral problems or who were currently manifesting problems in their day-to-day work. As a result of the task force review, and the determinations made by the commanding officers, 474 officers were "flagged" as violent prone. One hundred of these officers were removed from active patrol after being classified as presenting a "high risk" potential for violence, 368 officers were reassigned to less stressful command assignments and only six officers were reassigned to positions where they were not allowed to carry firearms. This marked the first attempt by the Police Department to develop a system of predictors for problem officers. The name of the program was eventually changed to the Early Warning System, with the emphasis changing from violence prone officers to tracking officers with emotional or behavioral problems. R. Zimmerman, Development of an Early Warning System Within the New York City Police Department (February, 1978) (unpublished thesis) (available in John Jay College of Criminal Justice Library); Interview with Sgts. Gerard W. Kelly and David W. Nadel, New York City Police Department, in New York City (March 4, 1982); Record at A475-76, *Bonsignore*.

At the time of the *Bonsignore* shooting in 1976, the EWS staff examined information in the personnel files such as sick-leave records, complaints, recommendations, transfer reports, and performance evaluations to detect problem officers. If a problem was detected, a colored dot was placed on the officer's file. Each color represented a different type of problem. The sergeant in charge of the centrally located personnel files was responsible for notifying the commanding officers of any police officer whose file had been flagged. Initially, however, it was the responsibility of the commanding officer and first line supervisor at the precinct level to make sure that the information was entered into the appropriate file. *Bonsignore*, 521 F. Supp. at 398; Nadel Interview, *supra*. See text accompanying notes 199-208 for a discussion of the present program.

The Second Circuit affirmed the verdict, stating that the jury could have found that the Early Warning System ("EWS"),¹⁴⁹ the city's program to identify unfit officers, was ineffective¹⁵⁰ because it was doomed by a "code of silence" existing among policemen.¹⁵¹ Moreover, the Second Circuit maintained that the EWS was operationally defective as illustrated by its failure to "flag" Bonsignore.¹⁵² Noting that the city had developed other screening programs,¹⁵³ the court determined that the jury could have reasonably concluded that the city was negligent either because the procedures involved were deficient, or because the city either abandoned or never fully implemented those programs.¹⁵⁴ The Second Circuit noted that the city had

150. *Bonsignore*, 683 F.2d at 637. The court found that one reason that the EWS was ineffective was that "the characteristics monitored by the use of colored dots were never validated as reliable indicators of mental or emotional problems in police officers." *Id.*

151. *Bonsignore*, 521 F. Supp. at 398. The plaintiff offered evidence that the code of silence, "an unwritten but compelling norm that a police officer shall not damage a fellow officer in any way," was an ethic impressed upon new recruits at the police academy, that it extended to superior officers, and that top officials were familiar with the code and had attempted to draft a new code of conduct that would make it an ethical imperative for officers to report colleagues. In addition, one plaintiff's witness "testified that police officers would be unlikely to report a fellow officer who displayed the traits manifested by Bonsignore." Moreover, the testimony as to the code of silence was unrebutted by the defendant. *Id.* at 398-99.

152. *Bonsignore*, 683 F.2d at 637. "Bonsignore was never identified as a problem officer, despite his displaying many of the signs that should have flagged him as having mental or emotional problems, such as excessive sick leave, incomplete performance reports, and assignment as the Nineteenth Precinct's attendant (or "broom"), a limited-duty assignment, for thirteen years." *Id.*

153. One such program is the Psychological Services Unit (PSU). *See* notes 192-97 *infra*. The plaintiff established that like EWS, the PSU, though commendable on paper, failed in practice because it did not take into account "peculiar institutional mores" of the police department. The plaintiff's witnesses testified that there was considerable stigma attached to seeking psychological help and that an officer's career would be harmed by the stigma of going to PSU. Therefore, officers would not readily seek psychological help voluntarily. *Bonsignore*, 521 F. Supp. at 399-400. The district court stated that "the PSU could not be relied upon to lead to detection and treatment of dangerous police officers" and "[t]he jury was therefore justified in concluding that the Police Department acted negligently in the manner in which it designed and operated the Psychological Services Unit." *Id.* at 400. The Second Circuit, however, did not mention the PSU. Although the PSU was in existence in 1976, there was no requirement that incoming officers undergo any type of psychological examination as to their fitness to carry guns and otherwise perform their duties when Bonsignore joined the Department in 1953. Bonsignore was never given a psychological examination in the 23 years that he was on the force. *Id.* at 398.

154. *Bonsignore*, 683 F.2d at 637. The court acknowledged that the city offered evidence that 1500 of the 25,240 Police Department members had been examined by psychiatrists, psychologists, or alcoholism counselors in 1976. Of these, 800 officers

offered no evidence that these programs, once implemented, were reviewed or evaluated to determine whether they were serving their intended purposes.¹⁵⁵ Therefore, the court held that the evidence was sufficient to support the jury's finding of negligence, as the measures adopted were so deficient that no reasonable person could have accepted the city's judgment in adopting them.¹⁵⁶

The Second Circuit also addressed the issue of proximate cause, stating that the jury could have reasonably found that Mrs. Bonsignore's injuries were proximately caused by the city's negligence.¹⁵⁷ The court noted that proximate cause limits a defendant's liability to "those foreseeable consequences that the defendant's negligence was a substantial factor in producing."¹⁵⁸ The court held that it was foresee-

were subject to constant monitoring. The court, however, reasoned that this evidence "did not preclude the jury from reasonably concluding that the city was negligent because of deficient procedures in regard to identifying police officers who should not carry weapons." *Id.*

155. *Bonsignore*, 683 F.2d at 637.

156. *Id.* The district court allowed that although the "City's defense was certainly competent, and no miscarriage of justice occurred," because it offered "virtually no defense of its programs," a one-sided and incomplete record may have resulted. Therefore, the court believed that it would be improper to permit this decision to serve as the basis for collateral estoppel against the city in future lawsuits. The court suggested that perhaps the city could have presented evidence showing that although their programs were ultimately unsuccessful, they "were not so deficient as to bespeak negligence on the part of the City." Since there is the possibility that other evidence could be introduced at future trials, "the City should be free to relitigate against other plaintiffs the adequacy of its psychological detection and treatment programs." *Bonsignore*, 521 F. Supp. at 402 & n.3 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-31 (1979); *Cerbone v. County of Westchester*, 508 F. Supp. 780, 785 (S.D.N.Y. 1981); *Schwartz v. Public Adm'r of County of Bronx*, 24 N.Y.2d 65, 72, 246 N.E.2d 725, 730, 298 N.Y.S.2d 955, 961 (1969)).

157. *Bonsignore*, 683 F.2d at 637. The plaintiff was obliged to prove proximate cause on both her claims, for assault and wrongful death. The jury found for the plaintiff on the proximate cause issue relative to plaintiff's own personal injury claim. The jury found that the city's negligence in allowing *Bonsignore* to continue as an armed police officer, with a duty to maintain a gun in his possession 24 hours a day, proximately caused the shooting of the plaintiff. The Second Circuit affirmed. *Id.* Federal courts had previously ruled that such proximate causation may properly be established. See, e.g., *Wanca v. Penn Indus., Inc.*, 260 F.2d 350 (2d Cir. 1958) (employer's failure to dismiss employee created a risk that a fight, which was foreseeable, would ensue and that given the human proclivities of workmen, there was a likelihood that one of the two employees would resort to a dangerous instrument and thereby injure an innocent bystander); *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966) (negligently releasing to duty an airman who was nervous, depressed, and emotionally upset as a result of marital difficulties was the proximate cause of the shooting and death of his former wife).

158. *Bonsignore*, 683 F.2d at 637-38, (citing *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 314-15, 414 N.E.2d 666, 670, 434 N.Y.S.2d 166, 169 (1980)).

able that requiring all police officers to be armed without conducting adequate screening posed a risk to other policemen and to members of the public.¹⁵⁹ The infliction of the injuries by Bonsignore's affirmative act did not relieve the city of responsibility, because the intervening act was a normal and foreseeable consequence of the city's negligence.¹⁶⁰ Moreover, the risk of the intervening act occurring was the same risk that rendered the city negligent.¹⁶¹ Therefore, because "both

See also W. PROSSER, *supra* note 20, §§ 41-45. " 'Proximate cause' . . . is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct." *Id.* at 236.

159. *Bonsignore*, 683 F.2d at 638. The defendant did not have to foresee the particular shooting of Mrs. Bonsignore in order for the plaintiff to recover; rather the issue was whether or not the defendant could be charged with foreseeing the likelihood of harm generally as the result of maintaining Bonsignore in its employ and requiring him to carry a gun 24 hours a day. Plaintiff-Appellee's Answering Brief, *Bonsignore*, at 22, (citing *Lubelfeld v. City of New York*, 4 N.Y.2d 455, 460-61, 176 N.Y.S.2d 302, 306 (1958) (action to recover damages sustained by taxicab driver who was shot without provocation by police officer who was off-duty, drunk and in possession of a gun, and had been placed in the taxicab by uniformed policemen)). See also *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d at 316-17, 414 N.E.2d at 671, 434 N.Y.S.2d at 170 ("That defendant could not anticipate the precise manner of the accident or the exact extent of injuries, however, does not preclude liability as a matter of law where the general risk and character of injuries are foreseeable."). In *Bonsignore*, the court found that "the consequences of the City's negligence were foreseeable within a degree of acceptability recognized in New York law." 683 F.2d at 638 (citing *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 314-15, 414 N.E.2d 666, 670, 434 N.Y.S.2d 166, 169 (1980); *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 520-21, 407 N.E.2d 451, 459, 429 N.Y.S.2d 606, 614-15 (1980); *Pagan v. Goldberger*, 51 A.D.2d 508, 382 N.Y.S.2d 549 (2d Dep't. 1976)). The court further noted that the consequences did not approach the degree of attenuation condemned in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928). *Bonsignore*, 683 F.2d at 638.

160. *Bonsignore*, 683 F.2d at 638. The court stated that "[w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal and foreseeable consequence of the situation created by the defendant's negligence. . . ." *Id.* (quoting *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d at 315, 414 N.E.2d at 670, 434 N.Y.S.2d at 169 (only when the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or so far removed from the defendant's conduct, will the act be superseding and therefore breach the causal connection)). See also *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d at 520-21, 407 N.E.2d at 459, 429 N.Y.S.2d at 614; W. PROSSER, *supra* note 20, § 44, at 271-72; RESTATEMENT (SECOND) OF TORTS §§ 448-449 (1965).

161. *Bonsignore*, 683 F.2d at 638 (quoting *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d at 316, 414 N.E.2d at 671, 434 N.Y.S.2d at 170 (jury could find that risk created by contractor was the injury of a worker by a car entering the improperly protected work area and, therefore, the driver's negligent failure to take medication which caused him to lose control of his car was not a superseding cause)).

the type of harm that occurred and the person on whom the injury was inflicted were foreseeable,"¹⁶² the court found that "[t]he City could reasonably have anticipated that its negligence in failing to identify officers who were unfit to carry guns would result in an unfit officer injuring someone using the gun he was required to carry."¹⁶³

B. The Punitive Damages Issue

The Second Circuit rejected the city's argument that the jury's punitive damage award was improper.¹⁶⁴ At the time of the decision,¹⁶⁵ New York law on municipal liability for punitive damages was unclear.¹⁶⁶ The court declined "to anticipate the ultimate resolution of

162. The district court noted that the "[p]laintiff amply demonstrated at trial the hazards of allowing unstable police officers to carry firearms" by showing that between 1973 and 1976, 33 officers were killed either by criminals, suicide, or by fellow officers, all with guns. 521 F. Supp. at 398. In addition, "the jury heard evidence that police officers are especially likely to suffer from emotional problems leading to violent behavior." *Id.* at 401. See notes 1 & 2 *supra* and accompanying text.

The court stated that "it was reasonably foreseeable that such an officer would injure a member of his own family." 683 F.2d at 638. The jury heard evidence that a person with a disorder such as suffered by Bonsignore was more likely to commit spousal homicide if he possessed firearms. In addition, the psychodynamics involved in using a gun (as opposed to some other instrumentality) to commit an act of violence were detailed. Record at A612, 625-27, *Bonsignore*. See note 4 *supra*.

163. *Bonsignore*, 683 F.2d at 638.

164. *Id.* The district court, in denying defendant's motion to set aside the punitive damages award of \$125,000, determined that the defendant did not object to the punitive damages jury instructions at trial, that "[t]he jury could reasonably have found that the City's efforts to deal with police violence were so inadequate as to constitute gross and wanton negligence," and that such an award "was necessary as a deterrent, to prod the (Police) Department into adopting meaningful measures to prevent the recurrence of tragedies like this one." *Bonsignore*, 521 F. Supp. at 402. Moreover, the court reasoned that the amount awarded was not excessive given that it was less than half of the compensatory damage award and considered it a "moderate but firm expression of the seriousness with which the jury regarded the insufficiency of defendant's efforts to deal with a persistent but readily manageable problem." *Id.* at 402-03.

165. The decision was handed down on June 15, 1982. *Bonsignore*, 683 F.2d at 635.

166. *Bonsignore*, 683 F.2d at 638, comparing *Sharapata v. Town of Islip*, 82 A.D.2d 350, 441 N.Y.S.2d 275 (2d Dep't 1981), *aff'd*, 56 N.Y.2d 332, 437 N.E.2d 1104, 452 N.Y.S.2d 347 (1982) (punitive damages are not available against a municipality), *cited with approval in* *LaBelle v. County of St. Lawrence*, 85 A.D.2d 759, 445 N.Y.S.2d 275 (3d Dep't 1981) *with* *Bevilaqua v. City of Niagara Falls*, 66 A.D.2d 988, 411 N.Y.S.2d 779 (4th Dep't 1978) (assuming that New York law allows punitive damages against a municipality).

this issue," emphasizing the city's failure to object to the jury instruction on punitive damages.¹⁶⁷

Two days after *Bonsignore* was decided,¹⁶⁸ the New York Court of Appeals resolved the punitive damages issue in *Sharapata v. Town of Islip*,¹⁶⁹ holding that the waiver of sovereign immunity contained in the Court of Claims Act¹⁷⁰ does not permit punitive damages to be assessed against the state or its political subdivisions.¹⁷¹ The Court of

167. 683 F.2d at 638 (citing FED. R. CIV. P. 51, which provides in part: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.").

168. The decision in *Sharapata v. Town of Islip* was handed down on June 17, 1982. 56 N.Y.2d 332, 437 N.E.2d 1104, 452 N.Y.S.2d 347 (1982).

169. 56 N.Y.2d 332, 437 N.E.2d 1104, 452 N.Y.S.2d 347 (1982) (negligence action brought by infant plaintiff to recover damages for injuries sustained on allegedly defective slide equipment located in a public park maintained by defendant town).

170. N.Y. CT. CL. ACT § 8 (McKinney 1963). See notes 30-34 *supra* and accompanying text.

171. *Sharapata*, 56 N.Y.2d at 334, 437 N.E.2d at 1105, 452 N.Y.2d at 348. See *Sharapata*, 82 A.D.2d 350, 355-62, 441 N.Y.S.2d 275, 277-82 (2d Dep't 1981) for a comprehensive review of New York case law on the subject, depicting either that the Court of Appeals had refused to make any definitive statement on the issue as to whether the nature or status of the defendant as a municipal corporation of itself affected the right of a plaintiff to recover punitive damages, or that the New York courts have instead relied upon the particular circumstances involved to settle the issue.

In *Sharapata*, the court analyzed the purposes of and the justifications for punitive damages as contrasted with compensatory damages and examined the legislative intent in waiving the State's immunity. *Sharapata*, 56 N.Y.2d at 335-39, 437 N.E. at 1105-08, 452 N.Y.S.2d at 348-51. The court explained that unlike compensatory damages, punitive damages are assessed to punish the wrongdoer rather than to restore the victim. In addition, the award of such damages is meant to deter repetition of the tortious conduct by both the defendant and others who might be tempted to imitate his conduct. *Sharapata*, 56 N.Y.2d at 335, 437 N.E.2d at 1105, 452 N.Y.S.2d at 348. See RESTATEMENT (SECOND) OF TORTS § 908 (1979); W. PROSSER, *supra* note 20, § 2, at 9. Moreover, punitive damages "may only be awarded for exceptional misconduct which transgresses mere negligence, as when the wrongdoer has acted 'maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness' or has engaged in 'outrageous or oppressive intentional misconduct' or with 'reckless or wanton disregard of safety or rights.'" *Sharapata* 56 N.Y.2d at 335, 437 N.E.2d at 1106, 452 N.Y.S.2d at 349, *citing*, Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216 (1960). The twin justifications for punitive damages are punishment and deterrence. The *Sharapata* court reasoned that these justifications are not advanced when applied to a governmental unit. The group for whose protection such damages were purportedly awarded, the citizens and taxpayers, would be the identical group who would bear the burden of the award. *Sharapata*, 56 N.Y.2d at 338-39, 437 N.E.2d at 1107, 452 N.Y.S.2d at 350.

Appeals' holding is in accord with the rule recognized by a majority of jurisdictions that, absent statutory authority, exemplary or punitive damages may not be recovered against a municipality.¹⁷² Although Mrs. Bonsignore's punitive damage claim was successful, it is doubtful whether plaintiffs in New York will be able to recover punitive damages from a city in the future.

C. 42 U.S.C. Section 1983

The Second Circuit held that a claim under 42 U.S.C. § 1983 was unavailable to the plaintiff.¹⁷³ The court, emphasizing that Bonsignore was off-duty, reasoned that the officer was not acting under color of state law when he shot his wife because his actions were outside the scope of his duties as a police officer.¹⁷⁴ Rather, the court determined that the shooting was within the ambit of Bonsignore's personal pursuits.¹⁷⁵ The court appears to have addressed only the "under color of law" theory of a section 1983 claim. The court failed to address the issue of whether the requirement that Bonsignore carry a gun at all times could have been considered under the custom and usage theory of municipal liability pursuant to the *Monell* court's construction of § 1983.¹⁷⁶

172. See generally 18 McQUILLIN, *supra* note 20, § 53.18a. See also Annot., 1 A.L.R. 4th 448; 57 AM. JUR. 2d, *supra* note 20, §§ 318-322; 63 C.J.S. *Municipal Corporations* § 495 (1949). For an example of the minority view, see *Young v. City of Des Moines*, 262 N.W.2d 612 (Iowa 1978) (rejecting the various policy reasons for denying punitive damages against a municipality, the court held that under proper circumstances, punitive damages were recoverable in tort claim actions against governmental subdivisions).

173. The district court denied plaintiff's motion to amend her complaint to include a § 1983 claim, plaintiff cross-appealed from the denial, and the Second Circuit affirmed. *Bonsignore*, 683 F.2d at 638.

174. *Id.* at 639 (citing *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1968)). *Johnson*, a pre-*Monell* decision which discussed whether police actions were under "color of law," held that name calling and offering to fight are not acts which are committed in the performance of any actual or pretended duty of a policeman. The court stated "[i]t is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law." *Johnson*, 284 F. Supp. at 937.

175. *Bonsignore*, 683 F.2d at 639 (citing *Screws v. United States*, 325 U.S. 91, 111 (1945) (plurality opinion) for the proposition that acts of police officers within the ambit of their personal pursuits are not "under color of state law").

176. See notes 107-09 *supra* and accompanying text.

V. The Effect of *Bonsignore*

Prior to *Bonsignore*, an attempted homicide¹⁷⁷ by a police officer would have precluded a finding of municipal liability under the theories of respondeat superior,¹⁷⁸ municipal negligence,¹⁷⁹ or under 42 U.S.C. §1983.¹⁸⁰ In *Bonsignore*, however, the city was found liable for its negligence in adopting inadequate screening methods to detect unfit policemen, despite the fact that the plaintiff's injuries were inflicted by an affirmative act of the officer.¹⁸¹ Thus, *Bonsignore* expanded the theory of municipal liability.

Under the negligent hiring or retention theory, the proximate cause requirement was an impediment to recovery.¹⁸² Although the city may have been negligent in hiring or retaining a police officer it knew or should have known was unfit,¹⁸³ liability was precluded because the injury resulted from an intervening act. The *Bonsignore* court, announcing an expansive interpretation of proximate cause, held that the officer's act was a normal and foreseeable consequence of the city's negligence in requiring *Bonsignore* to be armed at all times without conducting adequate screening procedures.¹⁸⁴

In addition, *Bonsignore* may have expanded municipal liability based on the inadequate training theory. Previously, the absence of proximate cause prevented recovery under this theory because the use of a police officer's weapon for the commission of a crime was an intervening act which precluded a finding of municipal liability for inadequate training.¹⁸⁵ *Bonsignore's* expanded analysis of proximate cause may be applied to inadequate training programs by arguing that an attempted homicide is a foreseeable consequence of requiring police officers to carry dangerous weapons without adequate training.

The *Bonsignore* court precluded the plaintiff from bringing a claim under 42 U.S.C. § 1983.¹⁸⁶ The court reasoned that the officer was not

177. N.Y. Times, Dec. 21, 1976, at 26, col. 2 (account of *Bonsignore* shooting).

178. See note 61 *supra* and accompanying text.

179. See notes 93-94 *supra* and accompanying text.

180. See note 120 *supra* and accompanying text.

181. See notes 160-63 *supra* and accompanying text.

182. N.Y.L.J., Oct. 28, 1982, at 1, col. 1.

183. The hiring or retention theory requires that the city have had notice that the police officer was unstable and that his retention involved a known risk of bodily harm to others. In *Bonsignore*, the city was not held liable because it should have known that *Bonsignore* was unfit, but because the programs developed to give that precise knowledge were so deficient. See notes 147-56 *supra* and accompanying text.

184. See notes 157-63 *supra*.

185. See notes 93-94 *supra* and accompanying text.

186. See note 173 *supra*.

acting under color of state law, but was acting solely within the ambit of his personal pursuits.¹⁸⁷ The court's analysis, however, is based upon cases which analyze *individual* liability under section 1983, rather than *municipal* liability under that statute.¹⁸⁸ In a case similar to *Bonsignore*, it should not be necessary to analyze an officer's tortious act under a color of state law theory, because it is the *city's* negligence which is at issue. The city's gun requirement should enable a plaintiff to bring a cause of action based on municipal liability under section 1983. As in *LaRocco*, the constitutional deprivation stemmed from the city's policy, regulation or custom requiring its police officers to carry firearms at all times.¹⁸⁹

Following *Bonsignore*, courts may be more willing to hold municipalities liable for a plaintiff's injuries resulting from a shooting by an unfit officer. Thus, *Bonsignore* illustrates the need for municipalities to adopt adequate screening and monitoring procedures to identify unfit police officers.

VI. A Proposal for a Model Program

Municipalities must develop programs to detect, at the precinct level, potential problem officers who are unfit to carry firearms. It is essential that problem officers be identified and evaluated before dangerous and fatal incidents occur. A program should serve two purposes. First, it must act as a screening device to detect candidates who are unfit to become officers. Second, it must continue to monitor the fitness of all officers during their tenure with a police department.

A model program would be comprised of several distinct components. First, periodic psychological testing should be administered to all members of the police department. Psychological tests are available which follow established criteria to predict how individuals will react in given stress situations.¹⁹⁰ Since "a person's psychological makeup predisposes that person to react in a certain way under given circumstances,"¹⁹¹ it is mandatory that police departments use psychological tests and procedures to detect officers who have personality disorders or are otherwise emotionally unsuitable for police work. In

187. See notes 174-75 *supra* and accompanying text.

188. The issue of individual liability is distinct from the issue of municipal liability under 42 U.S.C. § 1983. See notes 96-129 *supra* and accompanying text.

189. See note 115 *supra* and accompanying text.

190. G. BENNETT-SANDLER, LAW ENFORCEMENT AND CRIMINAL JUSTICE 248 (1979).

191. *Id.*

addition to psychological testing of all new recruits for the purposes of screening and selection, police departments should periodically administer psychological tests to all active members of the department.

New York's Psychological Services Unit (PSU)¹⁹² is an example of a program which administers psychological tests. PSU presently uses five personality tests¹⁹³ to evaluate police candidates.¹⁹⁴ Some candidates are rejected after testing, while others are marked "guarded" and are monitored during their Police Academy training and for their entire one year probationary period in the field.¹⁹⁵

PSU may be criticized, however, on several grounds. First, PSU fails to monitor officers beyond their probationary period.¹⁹⁶ Second, the use of PSU by more senior officers is principally voluntary unless an officer is required to participate by virtue of a command decision. Moreover, the combination of several factors, including the location of the PSU in the Police Academy, police officers' mistrust and scorn

192. The PSU was established in 1973 to serve three functions: (1) to administer psychological tests to police officers upon entering the Police Department; (2) to provide short term limited counseling to those officers experiencing emotional problems; and (3) to refer officers with more serious problems for long term counseling outside the department. Record at A477, *Bonsignore*.

193. These tests include the Cornell Index, a modified version of the Minnesota Multiphasic Personality Inventory, the House Tree Person Test, the Detroit Police Test, and the Rorschach Test. The results of these tests are analyzed to see if the candidate falls within the norms. In addition, interviews are conducted and three department psychologists review the material. Carroll Interview, *supra* note 7. The concept of administering psychological examinations to candidates to determine whether a particular candidate is qualified for police work is not new. It was first proposed in 1917. Murphy, *Current Practices in the Use of Psychological Testing by Police Agencies*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 570 (1972). There are approximately 36 different personality tests being used in police selection around the country. The tests are standardized and produce numerical scores by use of an answer key. The score is then compared to a "norm," an average score made previously by a like group. Further professional interpretation is then usually needed. Crosby, *The Psychological Examination in Police Selection*, 7 J. POLICE SCI. & ADMIN. 215, 218 (1979).

194. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court held that the Civil Rights Act of 1964 does not preclude the use of testing or measuring procedures for employment purposes, but it proscribes "giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." *Id.* at 436. In *Griggs*, black employees challenged requirement of a high school diploma or passing of intelligence test as a condition of employment. *Id.* at 424.

195. The probation period has been increased from six months to one year. The police department believes that the longer monitoring period, during which the psychological adjustment to working in the police department is observed, improves the likelihood of detecting unfit officers. Carroll Interview, *supra* note 7.

196. *Id.*

of psychiatrists, and the stigma attached to emotional illness, serves to discourage potentially unfit officers from seeking psychological treatment and further discourages others from recommending it.¹⁹⁷

To be effective, a psychological testing program must be administered on a periodic basis. Testing should not be restricted to those officers who have manifested emotional or psychological disorders. Periodic evaluations of officer candidates and current personnel are necessary for the maximum assurance that unfit officers will be detected at the earliest possible stage.¹⁹⁸

Second, a model system should include an Early Intervention Program (EIP) established in conjunction with regular psychological testing. New York City has an EIP which may form the basis of a model.¹⁹⁹ Under such a program, a confidential file containing negative personnel records is maintained for each officer.²⁰⁰ A simple review of the files enables appropriate police department personnel to monitor a potentially unfit officer.

There are two major sources of information feeding the EIP. The first, the Central Personnel Index (CPI), is the repository for negative personnel records. This repository contains records of: chronic or excessive sick leave, Civilian Review Board complaints, comments of superior officers, line of duty injuries, firearm discharges,²⁰¹ letters of

197. *Bonsignore*, 521 F. Supp. 394, 396. This opinion is supported by the executive officer of the New York City Police Department's PSU who stated recently that the PSU was underused. Approximately 50 officers seek help from the unit annually. In addition to the "stigma associated with any kind of emotional disturbance," the officers "feel they are under the scrutiny of other officers" because the PSU is located in the Police Academy. N.Y. Times, October 10, 1982, at 56, col. 1.

198. In *Bonsignore*, an expert witness testified that an individual suffering a mental disorder and deterioration such as *Bonsignore's* would, with reasonable psychological certainty, have demonstrated behavioral changes to those he came in daily contact with at work. Record at A627, *Bonsignore*. The New York City Police Department, however, offers a contrary view. The department maintains that mandatory across the board testing would undermine morale, be too costly, would meet with union resistance, and possibly encroach upon first amendment freedoms. The Department questions the utility of periodic testing prior to any indications of behavioral problems. Carroll Interview, *supra* note 7.

199. For a discussion of New York City's EIP, see G. Kelly and D. Nadel, *The New York City Police Department's Early Intervention Program: A History and Outline of Functions* (New York City Police Department Memorandum 1982) [hereinafter cited as *Memorandum*].

200. *Id.* at 2.

201. The Firearms Discharge Review Board was established in 1972 to review all incidents involving the discharge of a firearm by any member of the force whether on- or off-duty. New York City Police Department, Memorandum to All Commands, August 18, 1972.

criticism, negative transfers, civil suits, disciplinary actions, below standard annual performance evaluations,²⁰² off-duty employment, internal investigations (corrupt activity), salary garnishments, and abusive use of force.²⁰³ The police department's various agencies, bureaus, and units are required to submit new information to the CPI.²⁰⁴ Any new material entered into an individual's file mandates an evaluation of the entire file. If an individual is deemed to be a potential personnel concern the case is referred to an EIP counselor.²⁰⁵ Any doubt as to the need for such a referral is resolved in favor of it. The EIP determines whether to: refer the individual police officer to PSU, another department counselling service, or an appropriate outside agency; transfer the individual to other duty; or continue EIP monitoring.²⁰⁶

The second source of information feeding the EIP is the Field Resources System.²⁰⁷ Under this system, EIP investigators frequently visit all commands to elicit information directly from supervisors and peers concerning potentially unfit officers.²⁰⁸ On the basis of information received, the investigators may refer officers to PSU or other psychological or counselling programs.

202. The first line supervisor (sergeant) was responsible for evaluating the performance of each police officer in his group twice a year. A specific evaluation form was provided for the supervisors, in addition to an evaluation guide provided by the department which contained sets of questions to be answered by the evaluator in rating the officer on each of the criteria. One criterion, labeled "stability-flexibility," was directly related to the officer's capacity for stress and violence. The focus of the questions for this criterion, however, was on the officer out on the street, not on a limited duty assignment. A below standard evaluation was reported to the Central Personnel Index. Record at A495, A504-06, *Bonsignore*.

203. Memorandum, *supra* note 199, at 2-3. In addition, a loss of a shield, identification card or gun requires a notice to CPI for inclusion in an individual's file, as does a report of any "unusual occurrence on or off duty." *Id.*

204. Nadel Interview, *supra* note 149. See also Memorandum, *supra* note 199, at 2-3.

205. The staff of the EPI consists of two sergeants and one commanding officer. One sergeant serves as the staff psychotherapist/counselor and the other as an investigator/counselor. Memorandum, *supra* note 199, at 6-7.

206. *Id.* at 3-4.

207. *Id.* at 2.

208. *Id.* at 4. EIP investigators educate supervisors and peers as to what constitutes a "personnel concern" and to emphasize the nonpunitive, treatment function of the EIP. The educational aspect of the field visits was established to try to break down the "code of silence." *Id.* at 4-5. See note 151 *supra* for a discussion of the code of silence. The Department believes that this direct referral information is more accurate than CPI referrals. Memorandum, *supra* note 199 at 4, citing a 58% unfounded rate for CPI referrals, and a 24% unfounded rate for peer and supervisory referrals. Caution is urged. For example, on October 16, 1973, a letter was sent from the Police Department medical section to Bonsignore's commanding officer concerning Bonsignore's sick record, a factor that was to be flagged by the EWS. The

Additionally, positions should be categorized according to whether they require that a firearm be carried at all times, only while on active duty, or not at all. Equally important is the assignment of unfit officers to those positions in which a gun would never be required.

In 1978, the New York City Police Department's requirement for carrying guns while off-duty became discretionary in certain situations.²⁰⁹ These situations include: (1) where possession of the firearm would unnecessarily create a risk of loss of the firearm, such as during sporting activities; (2) while the officer is on vacation; (3) while the officer is engaged in authorized off-duty employment; or (4) while the officer is engaged in any activity in which it would not be advisable to carry a firearm.²¹⁰

Other municipalities should follow New York's example of removing the requirement that police officers carry guns at all times. Regulations should remove the gun requirement for certain departmental positions to which unfit officers could then be assigned. Non-patrol positions should be so classified.²¹¹ An example of such a position is the

medical section recommended that an interview with Bonsignore might disclose a serious disorder or underlying problem. There was no follow-up to this communication by the commanding officer. Record at A482, *Bonsignore*. It is suggested that it would be better to rely on more objective procedures by which the medical section would report this information directly to the CPI. The CPI, in turn, would alert the EIP, rather than rely on the more subjective nature of a direct referral from the commanding officer to an EIP investigator on a field visit. Given the code of silence, the more objective the system is, the more effective it will be in detecting unfit police officers.

209. NEW YORK CITY POLICE DEPARTMENT PATROL GUIDE, Section 105-1 ("Equipment Firearms").

210. *Id.* Effective 5/15/81, this regulation now reads:

1. Be armed at all times when in City of New York, unless otherwise directed, or except as provided in item number 2 below, with:
 - a. Service revolver, OR
 - b. Off duty revolver—Smith and Wesson, Ruger, or Colt double action calibre .38 Special revolver, with a barrel at least two (2) inches in length, military (Patridge) sights, blued parkerized finish and wooden stock.
2. Be unarmed at own discretion while off-duty when:
 - a. Possession of the firearm, under the circumstances, would unnecessarily create a risk of loss or theft of firearm. Circumstances may include sporting activities, attendance at beaches and pools, etc., OR
 - b. On vacation, OR
 - c. Engaged in authorized off-duty employment, OR
 - d. Engaged in any activity of a nature whereby it would be advisable NOT to carry a firearm.

Id.

211. See Safer, *supra* note 3, at 575-79 (arguments pro and con on arming police officers when off-duty).

"broom" position held by Officer Bonsignore, which is similar to that of a precinct attendant.²¹² By placing an unfit officer in a position where he would not be able to carry a gun, there is less risk that he would be in a position to misuse that gun to injure himself or another.

There are other recommendations of equal importance. Mandatory limitations should be placed on the length of time an unfit officer may spend on restricted duty or in limited capacity positions before a decision as to his further employment is reached.²¹³ High and low hazard command assignments should be designated, with mandatory time limitations placed upon an officer's assignment to a high hazard and more stressful precinct.²¹⁴ Psychological testing could be used after the established time frame has elapsed to determine whether the officer should continue in that assignment or be transferred. At any time prior to that limitation, an officer should be allowed to transfer if he believes it necessary for his own emotional stability.

Finally, a city should continually assess its screening and monitoring program.²¹⁵ It must maintain an awareness of programs adopted by other cities and be cognizant of developments in the field.²¹⁶

212. See note 139 *supra* and accompanying text.

213. The New York City Police Department, in order to reduce less than full-duty positions, has a six-month limitation on restricted duty. After six months, the officer is either returned to full-duty or retired. For example, if an officer is on sick leave continuously for a six-month period and there is a poor prognosis for return to duty, an application for a disability pension must be filed. If an officer continues on sick leave for one year, regardless of the prognosis for return to duty, an application for a disability pension is processed. In addition, there is a 30-day limitation on limited capacity positions. Upon expiration of 30 days, the officer is examined by a psychologist or psychiatrist or a physician. Two extensions of 30 days are possible, but after 90 days the officer is placed on restricted duty and this triggers a pension review. Carroll Interview, *supra* note 7. See also New York City Police Department Administrative Guide, "Chronic Absence Control Program" 318-18 (1980). In addition, the Health Services Division constantly monitors sick leave, and chronic absence reports are sent to CPI. *But see* note 152 *supra*. In 1976, New York *did* have a regulation requiring an investigation of any police officer who had been assigned to limited-duty for more than one year. The results of the investigation were to be reported to the Commissioner. Bonsignore was not investigated. 683 F.2d at 637.

214. New York currently has a voluntary program in which any officer may request a transfer to a less stressful assignment but only after a period of two years has elapsed and not prior to that time. Nadel Interview, *supra* note 149. See also Zimmerman, *supra* note 149, for a discussion of the classification of commands into hazard ratings and the effect of stress on police performance in high hazard positions.

215. In *Bonsignore*, the Second Circuit noted that there was no evidence that the city reviewed and evaluated the adequacy of the programs that were implemented. 683 F.2d at 637.

216. In *Bonsignore*, the jury was not evaluating the city's program in a vacuum. The plaintiff presented evidence concerning the widespread acknowledgment of the

VII. Conclusion

Shootings by police officers who are unfit to carry guns are unnecessary and tragic events for both the officer and the victim, who is often the officer himself. As more shootings occur, the need for developing programs to evaluate the psychological well-being of police officers becomes increasingly apparent. It is only when adequate monitoring procedures are developed and are scrupulously enforced that municipalities will reduce their liability for injuries resulting from unjustified, senseless and preventable acts of violence committed by unfit police officers. Moreover, those upon whom we place the difficult burden of protecting us deserve programs designed to protect and preserve their physical and psychological well-being.

Pamela A. Keating

need for such measures prior to 1976. The jury evaluated evidence concerning programs established by other cities of comparable size, the expected effectiveness, costs, administrative burdens, and the actual results of such programs. The judge informed the jury that they were to consider all this information, but cautioned that they were not to "treat the City as having known in 1976 any information introduced in this trial that was not shown to have been available to the City at that time." Record at A861, *Bonsignore*.